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No. 81-2210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GREYHOUND LINES, INC.

Petitioner,

v.

RICHARD PRICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether 33 U.S.C. § 921(c) is a statute of venue or jurisdiction.

2. Whether an appellate court has an inherent power to transfer a pending case to another circuit when the latter circuit is alleged to have exclusive jurisdiction and venue.

3. Whether the Court of Appeals erred in dismissing the Petition for Review under 33 U.S.C. 33 USC 921(c), and in failing to rule on Petitioner's Motion to Transfer to the Third Circuit.

4. Whether the Court of Appeals should have exercised its inherent power and, in the interest of justice, transferred the Petition for Review to the Third Circuit for a decision on the merits.

LIST OF PARTIES [1]

The parties before the Court of Appeals were Greyhound Lines, Inc. ("Greyhound"), as Petitioner, and Richard Price, as Respondent. [2]

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[1] Petitioner, Greyhound Lines, Inc., reports pursuant to Rule 28.1 of the Rules of this Court, that Greyhound Lines, Inc., is a wholly-owned subsidiary of The Greyhound Corporation, the parent company, with other subsidiary companies which are wholly-owned. Affiliate companies not wholly-owned include: Greyhound Bus Depot of Atlanta, Inc., Greyhound Lines of Canada, Ltd., Greyhound Taseco Saudi Arabia, Ltd., Jefferson Lines Holding Co., Kerriville Bus Company, Inc., K. G. Lines, Inc., Southeastern Stages, Inc., Springfield Bus Terminal Corporation, Union Bus Station of Oklahoma City, Oklahoma, Inc., and Wilmington Union Bus Station Corporation.

[2] The Director, Office of Workers' Compensation Programs, United States Department of Labor was not a party in the court below. However, the Director filed a "Response" to Petitioner's Motion to Transfer, although not requested by the court to intervene or state his position.

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RICHARD PRICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Greyhound Lines, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which dismissed its appeal for lack of subject-matter jurisdiction, and failed to transfer the appeal to the Third Circuit, where jurisdiction and venue were undisputed.

OPINIONS BELOW

The decision and order of the Administrative Law Judge (No. 79-DCWC-123) issued March 17, 1980, is not reported but appears as Appendix D (App. 6a) hereto. The order of the Benefits Review Board (No. 80-348) dated August 28, 1981, is reported at 14 BRBS 439 (1982) and appears as Appendix C (App. 3a) hereto. The order of the United States Court of Appeals for the Fourth Circuit, from which certiorari is sought, dated January 4, 1982, is unreported and appears as Appendix

B (App. 2a) hereto. The order of the Court of Appeals for the Fourth Circuit denying a petition for rehearing and a suggestion for rehearing *en banc*, dated March 1, 1982, is unreported but appears as Appendix A (App. 1a) hereto.

JURISDICTION

The Court of Appeals' decision in this case was rendered on January 4, 1982 (App. 2a). A timely petition for rehearing and suggestion for rehearing *en banc* was filed on January 18, 1982, and denied on March 1, 1982 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The relevant statutory provisions are as follows:

District of Columbia Code:

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

> The provisions of chapter 18 of title 33 U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

United States Code, Title 28:

§ 1404 Change of venue.

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

* * *

§ 1406 Cure or waiver of defects.

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

* * *

§ 2112 Record on review and enforcement of agency orders.

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all

the proceedings with respect to such order to any other court of appeals.

* * *

United States Code, Title 33:

§ 908 Compensation for disability.

Compensation for disability shall be paid to the employee as follows:

* * *

(f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of section 8(c)(1)-(20), the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

(2) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 44.

* * *

§ 921 Review of Compensation Order.

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. . . .

* * *

STATEMENT OF THE CASE

This case arises as a result of a back injury suffered by Richard Price ("Price") during the course of his employment with Petitioner, Greyhound Lines, Inc. ("Greyhound"). At the time of his injury, Price was covered by the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501, 502 (1973), which, in turn, incorporated the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (1976) ("LHWCA") (App. 2). At the hearing before an Administrative Law Judge of the United States Department of Labor, Price, through his counsel, claimed he was permanently totally disabled due to his injury, suffered during the course of his employment as a long-distance bus driver with Greyhound. The injury occurred on August 11, 1977, in Bloomsburg, Pennsylvania; the residence of the employee at the time of the accident was Arbutus, Maryland, and, at the time of the hearing, Price was a resident of Fort Orange, Florida. Price worked out of Greyhound's bus terminal in Washington, D.C., where he reported to work. The fact of injury was undisputed. However, the employer disputed whether Price was permanently totally disabled due to his back injury alone, or whether, if permanently totally disabled due to that injury, said disability was combined with a previous

cardiovascular impairment, in which case Greyhound was entitled to limit its liability to one hundred and four weeks of compensation payments pursuant to 33 U.S.C § 908(f).

After a hearing and the production of witnesses and medical reports, the Administrative Law Judge found that the claimant was permanently totally disabled due to his back injury, and rejected Greyhound's position that its liability should be limited, finding that Price's disability was due to the back condition alone, without any contribution of his prior cardiovascular disease (App. 18a). The Benefits Review Board, upon appeal, upheld the decision of the Administrative Law Judge, stating only that it was based upon substantial evidence in the record considered as a whole (App. 5a).

Greyhound appealed this ruling to the United States Court of Appeals for the Fourth Circuit. The Benefits Review Board filed its certified record with the court. Price, thereafter, filed a Motion to Dismiss, citing 33 U.S.C. § 921(c), and stated that the case properly belonged in the Third Circuit. Greyhound opposed the Motion to Dismiss, but also moved to transfer the case from the Fourth Circuit to the Third Circuit, where Price did not dispute jurisdiction or venue.[3]

The Fourth Circuit, without oral argument, granted Respondent's Motion to Dismiss (App. 2a). No ruling was ever made upon Greyhound's Motion to Transfer. Greyhound thereafter filed Petitions for Rehearing and Suggestion for Rehearing *en banc*, based primarily upon the failure to transfer. The Court of Appeals denied the Petitions without opinion (App. 1a).

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[3] Price filed a Supplemental Memorandum and Points and Authorities in Support of his Motion to Dismiss and in Response to Petitioner's Motion to Transfer. Petitioner also filed in return a Reply to Respondent's Memorandum in Response to the Motion to Transfer and, in addition, filed Supplemental Points and Authorities in Support of its Motion to Transfer.

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to pass upon the Court of Appeals interpretation of 33 U.S.C. § 921(c) of the LHWCA, as extended by the District of Columbia Workmen's Compensation Act, and to pass upon whether the Fourth Circuit should have ruled on Greyhound's Motion to Transfer and granted the transfer of this case to the Third Circuit.

ARGUMENT

Arguably, the decision below might appear to be an ordinary and narrow one of statutory construction in which the Court of Appeals followed one of two permissible views adopted by the Circuit Courts of Appeals for interpreting 33 U.S.C. § 921(c) and granting or denying transfer of a Petition for Review filed in the wrong Circuit to the correct Circuit, where it should have been filed originally. In fact, however, the Court of Appeals, in refusing to rule on the Motion to Transfer, failed to rule on the central issue raised in the case, concerning whether the Court should transfer the case when it lacked subject-matter jurisdiction.

I. The Fourth Circuit Was Wrong In Dismissing The Petition Rather Than Transferring It.

The Fourth Circuit found that it did not have jurisdiction to hear the appeal "because the accident occurred in Pennsylvania, within the jurisdiction of the Third Circuit." Citing 33 U.S.C. § 921(c) in its order, the court indicated that the dismissal was granted "for lack of subject-matter jurisdiction." (App. 2a) In interpreting 33 U.S.C. § 921(c) there must first be a determination as to whether this is a statute limiting subject-matter jurisdiction under the LHWCA for appeals from the Benefits Review Board to the Circuit Court of Appeals. Congress has specified in the statutory language that:

> "(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order

> in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. . . ."

A review of the statute shows that the terms used by Congress in this statute were that a person "may" obtain review of a final order of the Board "in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days . . . a written petition praying that the order be modified or set aside. . . ." The statute does not say that the person aggrieved "must" file his petition in the United States court of appeals for the circuit in which the injury occurred. The language is not mandatory but permissive. There is no dispute herein that the Petition for Review was timely filed within sixty days with the Fourth Circuit Court of Appeals.

The first issue is thus whether this statute is a venue provision. In *Panhandle Eastern Pipeline Co. v. FPC*, 324 U.S. 635 (1945), this Court held that a judicial review statute conferring jurisdiction on any circuit wherein the "company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . ." conferred jurisdiction to review on *all* courts of appeals, and relates to venue not jurisdiction. If 33 U.S.C. § 921(c) is read to confer jurisdiction on any court of appeals, then it is indeed a venue provision which provides that a timely-filed petition should be heard and decided by the court of appeals for the circuit in which the injury occurred. Assuming that it was the intent of Congress that an appeal from the Benefits Review Board arising out of an injury which occurred in Bloomsburg, Pennsylvania, filed under the District of Columbia extension to the LHWCA could be heard in any circuit, then the Fourth Circuit was wrong in dismissing the case and failing to transfer.

Assuming *arguendo*, that the statutory language indicates that subject-matter jurisdiction is only in the Third Circuit because this is where the injury occurred, then there still remains the question of whether the Fourth Circuit Court of Appeals has the inherent power to transfer this case to the Third Circuit to be decided on its merits. Petitioner submits that in the interest of justice, the Court should have done so because its dismissal for lack of jurisdiction totally prevented a disposition on the merits, since the time for filing a second petition for review in the Third Circuit had already run. If lack of subject-matter jurisdiction mandates a dismissal which, in effect, is with prejudice because of the limitation period set forth in the statute, then rightly or wrongly, in the absence of statutory authority similar to 28 U.S.C. § 1404(a) and § 1406(a), this Court ought to decide whether appellate courts should transfer rather than dismiss timely-filed petitions for review under 33 U.S.C. § 921(c).

II. There Is A Square Conflict Between The Circuits And Within At Least One Circuit As To The Power Of The Circuit Court To Transfer To A Proper Forum A Case Under The LHWCA Which Has Been Filed In The Wrong Circuit In The First Instance.

Assuming that this Court were to find that 33 U.S.C. § 921(c) is a statute construing subject-matter jurisdiction and not venue, Petitioner asks this Court to consider the purpose behind such legislative enactments as 28 U.S.C. § 1404(a), § 1406(a) and § 2112(a), and decide that the greater weight of reasoned authority supports the granting of Petitioner's Motion for Transfer filed in the court below and immediate transfer of this Petition for Review to the Third Circuit for briefing and a decision.

Furthermore, there is a conflict of authority within the First Circuit concerning whether that court has an "inherent power" to transfer. In *Natural Resources Defense Council* v. *EPA*, 465 F.2d 492 (1st Cir. 1972), the court ruled that it did have the

inherent power to transfer, and transferred the appeal. More recently, however, in *Dantes* v. *Western Foundation Associates*, 614 F.2d 299 (1980), the First Circuit held otherwise. In *Dantes*, the appeal was filed in the First Circuit but arguably should have been filed in the Second Circuit because the injury occurred within the Second Circuit. Petitioners therein argued that § 921(c) was a statute relating to venue and not jurisdiction, and in fact the Respondent waived jurisdiction by filing his brief without objecting to jurisdiction. The First Circuit, in reviewing this statute prior to the 1972 Amendments, found that it had been consistently interpreted to confer jurisdiction only upon the district court within whose territorial jurisdiction the injury occurred. The court determined that the geographical specification of the court with power to hear the petition was not changed by the 1972 Amendments, and construed 33 U.S.C. § 921(c) as conferring "exclusive" jurisdiction to hear a petition for review in the court of appeals for the circuit in which the injury occurred. As authority for this proposition, the First Circuit cited the case of *Pearce* v. *Director, OWCP*, 603 F.2d 763 (9th Cir. 1979).

Petitioners in *Dantes* had urged that the court transfer the case to the Second Circuit rather than dismiss it. The court, however, dismissed. In so ruling, the court cited *Natural Resources Defense Council* v. *EPA*, *supra*, 465 F.2d at 496, and noted that this was a transfer pursuant to 28 U.S.C. § 2112(a). The court also considered *Pearce* v. *Director, OWCP*, *supra*, 603 F.2d at 771, and *Dayton Power and Light* v. *EPA*, 520 F.2d 703, 708 (6th Cir. 1975), "unpersuasive." 614 F.2d at 301 n.2. In *Dantes*, the First Circuit relied upon the Third Circuit opinion in *Atlantic Shiprigging Co.* v. *McLelland*, 228 F.2d 589 (1961). However, even in that opinion, the Third Circuit agreed with the District Court that it had no authority to transfer, but at least ruled upon a motion to transfer filed therein.

In support of its Motion to Transfer, Greyhound had relied in the Fourth Circuit upon the Ninth Circuit's opinion in *Pearce* v.

Director, OWCP, supra, wherein the Director, OWCP, a party in the case, had urged dismissal under 33 U.S.C. § 921(c). Although the appeal involved the Defense Base Act, the court concluded that since it incorporated the Longshoremen's Act, including amendments to it (as does the District of Columbia Workmen's Compensation Act), the 1972 Longshoremen's Act amendments should apply, citing this Court's opinion in *Director, Office of Workers' Compensation Programs* v. *Rasmussen,* 440 U.S. 29 (1979), and opinions from the circuit courts construing this Act in *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467 (1st Cir. 1979); *Air America, Inc.* v. *Director, Office of Workers' Compensation Programs,* 597 F.2d 773 (1st Cir. 1979); *Landrum* v. *Air America, Inc.*, 534 F.2d 67, 69 (5th Cir. 1978), and *Overseas African Construction Corp.* v. *McMullen,* 500 F.2d 1291, 1297-1298 n.14 (2d Cir. 1974).

In *Pearce,* the Ninth Circuit found that it had the "power to transfer a pending case to another circuit even when the latter circuit has *exclusive* jurisdiction and venue to review the order in question" (emphasis supplied). For this proposition of law, the Ninth Circuit cited cases from its own Circuit, as well as cases from the First, Second, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, as well as the District of Columbia Circuit. 603 F.2d at 771 n.3. The court expressed concern that if it were to dismiss *Pearce,* and then a petition be filed with the Seventh Circuit (which was the Circuit where the injury occurred), the petitioner would be time-barred by 33 U.S.C. § 921.[4] There is no specific finding in *Pearce* whether 33 U.S.C. § 921(c) is a statute of venue or a statute of jurisdiction, but the court noted:

> "Transfer keeps the case before us alive, and that is what ought to happen." (*Id.* at 771.)

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[4] After transfer from the Ninth Circuit, the Director, OWCP, also asked the Seventh Circuit to dismiss, but the Seventh Circuit held that the Ninth Circuit's ruling on transferrability was "res judicata." *Pearce* v. *Director, OWCP,* 647 F.2d 716, 720-721 (1981).

The court further cited *Pacific Gas and Electric Co.* v. *FPC*, 253 F.2d 536 (9th Cir. 1958), wherein it held that it had neither venue nor jurisdiction of a petition for review of an agency proceeding, but found that it had the power to transfer, and did transfer the controversy to the District of Columbia Circuit. Subsequently, the D.C. Circuit stated that the Ninth Circuit "had inherent power based on sound principles of judicial administration" to transfer the case to the District of Columbia Circuit and that, upon transfer, the District of Columbia Circuit was invested with jurisdiction over the petition. *Pacific Gas and Electric Co.* v. *FPC*, 272 F.2d 510, 511 (1958).

The First Circuit's opinion in *Dantes* was decided after the Ninth Circuit's opinion in *Pearce*. Even in *Dantes*, when a motion to transfer was apparently made, the Circuit Court ruled on the question of transfer, although ruling against the petitioner. The Fourth Circuit herein did not even do that, failing to comment, to consider, or to decide the question of transfer which had been placed before it by the parties herein.

The District of Columbia Circuit considered 33 U.S.C. § 921(c) in *Director, OWCP* v. *National Van Lines*, 613 F.2d 972 (1979). In that case, the injury which was the subject of claim occurred in New York, but claim was brought under the District of Columbia Workmen's Compensation Act, The court was again asked by the Director, OWCP to dismiss, but found it had jurisdiction. There was a strong dissent, noting that the accident occurred in New York, within the Second Circuit. Citing *Home Indemnity Co.* v. *Stillwell*, 597 F.2d 87, 90 (6th Cir. 1979), *cert. denied*, 444 U.S. 689 (1979), it argued that review was proper there, not in the District of Columbia. However, a reading of the *National Van Lines* and *Home*

Indemnity opinions, makes it appear that no motion to transfer apparently was filed in either case. The effect of the decision in *National Van Lines* was to accept jurisdiction in the District of Columbia Circuit, even when such holding conflicted with prior statutory interpretation, later relied on by the First Circuit in *Dantes, supra*.

This Court has never had occasion to rule upon the question of whether, under this statute, 33 U.S.C. § 921(c), an appellate court should transfer a petition for review rather than dismissing it. In *Koehring Co.* v. *Hyde Construction Co.*, 382 U.S. 362 (1966), this Court held that where "unusual circumstances" indicate the necessity, a court can effect a transfer by direct order, even without an express statutory grant of power to do so. The decision of a district court to transfer a case was specifically endorsed by this Court in *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463 (1962). In that case, Mr. Justice Black stated for the Court that in 28 U.S.C. § 1406(a), the district court transfer statute, Congress recognized that the "interest of justice" may require that a cause not be dismissed, but:

> ". . . rather that it be transfered in order that the plaintiff not be penalized by what the late Judge Parker [in *Internatio-Rotterdam, Inc.* v. *Thomsen*, 218 F.2d 314 (4th Cir. 1955)] aptly characterized as time-consuming and justice-defeating technicalities." 369 U.S. at 467.

In *Goldlawr*, this Court reversed the Second Circuit, stating that a transfer was proper in order to save a timely-filed case, even though the transfer court had no personal jurisdiction over the defendant, and stated as follows:

> "The language of Section 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the Court in which it was filed had personal jurisdiction over the defendants or not. The Section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years —

> that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a law suit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of Section 1406(a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized. . . ." *Id.* at 466-467.

Thus, this Court has decreed that cases should be transferred rather than dismissed, and this was what the Ninth Circuit also found in *Pearce*.

Most recently, in *Dunn* v. *United States Department of Agriculture*, 654 F.2d 64 (Ct.Cl. 1981), the Court of Claims found that it lacked subject-matter jurisdiction, but then held:

> "However, it has been suggested, and we believe, that the United States Court of Appeals for the Fifth Circuit probably has *exclusive* jurisdiction of this appeal. We conclude that we have the inherent power to transfer the case to that Circuit, and accordingly, we order the transfer." (Emphasis supplied.) 654 F.2d at 65.

The *Dunn* case also noted that there is no statute which authorizes a Court of Appeals to transfer a case to another Circuit having jurisdiction or venue of the case, but noted that it is now the "great weight of authority" that a Court of Appeals has the inherent power to order such transfers in the interest of justice and sound judicial administration. *See, American Telephone & Telegraph Co.* v. *FCC*, 519 F.2d 322, 325 (2d Cir. 1975), citing decisions by the First, Second, Fifth and Tenth Circuits, as well as by the District of Columbia Circuit.

In view of the fact that there is no statutory authority for transfer among the Federal Circuit Courts of Appeals, but there

is such statutory authority to transfer cases to other district courts, Petitioner suggests that the moment is right for this Court to consider whether, under 33 U.S.C. § 921(c) and 28 U.S.C. § 1404(a), § 1406(a) and § 2112(a), Congress intended to urge transfer from an appellate court where there is asserted to be no jurisdiction or venue, to another appellate court where it is agreed that both jurisdiction and venue will lie. Direct transfer not only furthers the policies behind Section 1406 of 28 U.S. Code, but also comports with the precepts of judicial economy. *John T. MacDonald Foundation* v. *Califano*, 571 F.2d 328, 332 (5th Cir. 1978).

Petitioner herein, specifically barred by the failure of the Fourth Circuit to consider transfer of this case to the Third Circuit, respectfully asks this Court to do what the Fourth Circuit failed to do, and find that the interest of justice is furthered by transfer.

III. The Question Posed Herein, Concerning Whether Courts Should Transfer Appeals To Other Circuits, Is A Question Of Exceptional Importance.

The question of transferring cases under the LHWCA, 33 U.S.C. § 921 *et seq.*, is a matter of national importance for litigants under this Act and its extensions. As indicated by the conflicting interpretations in the *Pearce* and *Dantes* decisions, the question of transfer of an appeal from the Benefits Review Board to the proper Circuit is a question which could benefit national uniformity of decisions by appellate courts on the permissibility of transfer, rather than an individual circuit approach.[5] Petitioner suggests to this Court that the greater weight of authority cited by Petitioner herein supports its posi-

[5] In the "Response" of the Director, Office of Workers' Compensation Programs, United States Department of Labor, filed below, the Director conceded that questions presented by this case are substantial, and agreed with Greyhound that *Pacific Gas & Electric, supra, Pearce, supra,* and *Dunn, supra,* are all in conflict with his view.

tion that the Fourth Circuit had the inherent power to transfer this Petition for Review from the Fourth Circuit to the Third Circuit, where it might have been brought and, thus, to allow a decision in this case on its merits, rather than by dismissal.

CONCLUSION

Petitioner Greyhound respectfully requests this Court to grant the Petition for a Writ of Certiorari filed herein, and to order the Fourth Circuit to reinstate Petitioner's appeal and transfer this case in the interest of justice to the Third Circuit for a decision on the merits.

Respectfully submitted

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GALIHER, CLARKE, MARTELL & DONNELLY

APPENDIX

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IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1934

GREYHOUND LINES, INC., *Petitioner*,

v.

RICHARD PRICE, *Respondent*.

ORDER

Upon consideration of the petitioner's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell with the concurrence of Judge Hall and Judge Sprouse.

For the Court,

/s/ William K. Slate, II

CLERK

FILED
March 1 1982
U.S. Court of Appeals
Fourth Circuit

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1934

GREYHOUND LINES, INC., *Petitioner*,

v.

RICHARD PRICE, *Respondent*.

ORDER

Respondent, Richard Price, has moved this court to dismiss this appeal for lack of subject matter jurisdiction.

Price was injured in Bloomsburg, Pennsylvania. He received compensation under the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*. Petitioner appeals that award. This court does not have jurisdiction to hear the appeal because the accident occurred in Pennsylvania, within the jurisdiction of the Third Circuit. 33 U.S.C. § 921(c).

Accordingly, it is ORDERED that the motion to dismiss for lack of subject matter jurisdiction is GRANTED.

Entered with the concurrences of Judge Russell and Judge Sprouse.

/s/ K. K. HALL

K. K. Hall
United States Circuit Judge

FILED
Jan 4 1982
U.S. Court of Appeals
Fourth Circuit

EXHIBIT A
BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 80-348

RICHARD PRICE,

Claimant,

v.

GREYHOUND BUS LINES, INCORPORATED

Self-Insured Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent

DECISION AND ORDER

Appeal from the Decision and Order of Arline Pacht, Administrative Law Judge, United States Department of Labor.

Wayne Mansulla (Ashcraft & Gerel), Washington, D.C., for the claimant.

Richard W. Galiher, Jr. (Galiher, Clarke, Martell & Donnelly), Washington, D.C., for the employer.

Before: MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

FILED AS PART
OF THE RECORD

JUL 31 1981

(date)

/s/ AGNES KURTZ

Clerk
Benefits Review Board

This is an appeal by the self-insured employer, Greyhound Bus Lines, Incorporated, from the Decision and Order (79-DCWC-123) of Administrative Law Judge Arline Pacht pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the D.C. Workmen's Compensation Act, 36 D.C. Code § 501 *et seq.* (hereinafter, the Act).

After considering the evidence of record presented at the hearing, the administrative law judge found that the claimant was permanently and totally disabled as the result of a work-related injury. She denied Section 8(f) relief to employer on the grounds that employer had "failed to prove that claimant's back impairment was not the sole cause of his disability." Slip op. at 10.

Employer has appealed that part of the administrative law judge's decision pertaining to the denial of Section 8(f) relief, asserting that claimant's pre-existing disability did contribute to his permanent and total disability.[1]

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[1] Claimant has filed a response brief arguing that the administrative law judge's denial of Section 8(f) relief was proper. Employer has moved that claimant's arguments on this point be stricken based on the Board's holdings that a claimant lacks standing to argue against Section 8(f) relief. *See Schuster* v. *Roger Smith Hotel*, 7 BRBS 255 (1977); *Nobles* v. *Children's Hospital*, 8 BRBS 13 (1978); *Sims* v. *Singleton Electric Co.*, 9 BRBS 1068 (1978). Claimant has responded, listing a variety of reasons why claimant should be considered to have standing: Claimant argues that the applicability of the fund often results in the loss of settlement options. A similar argument was rejected in *Sims*. He also contends that the involvement of the special fund complicates litigation by automatically making the Department of Labor an active party in the case. We fail to see how allowing claimant standing to argue Section 8(f) removes the Department of Labor from the litigation process. Claimant further argues that denying claimant standing allows only one side of the issue to be presented. However, we note that the Director does have the right to file a brief opposing employer's allegations. Claimant also points to his inherent right to decide who will pay him. Any such inherent right, however, is subject to statutory modification. By providing for the special fund, Congress has clearly diminished this "inherent right." Claimant also points to the possibility of the bankruptcy of the

Section 8(f) of the Act, 33 U.S.C. § 908(f), is not applicable in cases where claimant's subsequent injury would have rendered him permanently and totally disabled irrespective of any pre-existing disability. *See Picoriello* v. *Caddell Dry Dock Co.*, 12 BRBS 84 (1980).

Having carefully reviewed the record, we find that the Decision and Order of the administrative law judge is supported by substantial evidence in the record considered as a whole and is in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *Picoriello, supra.*

Accordingly, the Decision and Order of the administrative law judge is hereby affirmed.

/s/ JULIUS MILLER

Julius Miller
Administrative Apeals Judge

/s/ ISMENE M. KALARIS

Ismene M. Kalaris
Administrative Appeals Judge

Dated this 31st day of July 1981

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special fund. We consider this possibility too remote and legally insufficient to confer standing. Claimant also notes that the U.S. Court of Appeals for the D.C. Circuit has permitted the claimant to argue the Section 8(f) issue denying an employer's motion to dismiss. *Delinski* v. *Brandt Airflex Corp.*, Nos. 78-2309, 2314, 2315 (D.C. Cir. July 26, 1979). However, we consider the impact of this Order questionable in light of the Court's apparent denial of attorney's fees for time spent arguing the Section 8(f) issue. *Director, OWCP* v. *Brandt Airflex Corp.*, Nos. 78-2309, 2314, 2315 (D.C. Cir. June 24, 1981). Accordingly, we grant employer's motion and strike claimant's Section 8(f) arguments.

U.S. DEPARTMENT OF LABOR

Office Of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 79-DCWC-123
OWCP No. 118134

In the Matter of

RICHARD PRICE,

Claimant,

v.

GREYHOUND LINES, INC.

Employer

and

GAY AND TAYLOR, INC.

Carrier

Wayne Mansulla, Esquire
2101 L Street, N.W.
Washington, D.C. 20037
For the Claimant

Richard Galiher, Jr., Esquire
1215 19th Street, N.W.
Washington, D.C.

Before: ARLINE PACHT
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, (the Act) as extended to the District of Columbia pursuant to 36 D.C. Code 501. A hearing was held on November 27, 1979 in Washington,

D.C. for the receipt of testimonial and documentary evidence.[1] Thereafter, the claimant submitted a post-hearing deposition and both parties filed briefs. The Director also stated its position with regard to the potential liability of the Special Fund by letter dated November 3, 1979.

ISSUES

The issues in this case involve:

I. The nature and extent of claimant's disability;

II. Whether Section 8(f) of the Act applies to limit the employer's liability;

III. Whether the employer is collaterally estopped from denying that the claimant's disability is due solely to an injury to his back; and

IV. Whether the penalty provisions of Section 14(e) of the Act apply.

THE EVIDENCE

The claimant, Richard Price, who is now 55 years old, was a long distance bus driver for Greyhound Lines, Inc., the respondent, for approximately 29 years. Before working for Greyhound, he served as a machine gunner with the Army and thereafter was employed for several years as a coal truck driver.

As an over-the-road driver for respondent, Mr. Price's duties were described in the following terms: must lift package express up to 100 lbs.; must change tires weighing up to 250 pounds when necessary; must withstand the rigors of long distance driving; must cope with the irritations that rise from dealing with difficult passengers and situations, and provide the safest possible transportation for up to 43 passengers. (EX. 3, p. 18).

On August 11, 1977, during the course of a regular 7 hour tour, Mr. Price made a scheduled stop and as he was reaching into a storage compartment on the side of the bus to extract luggage, the baggage

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[1] Abbreviations used throughout this Decision as references to the record are as follows: Transcript of hearing-TR; Claimant's Exhibit-CX; Employer's Exhibit-EX; Deposition-Dep.

door weighing approximately 35 to 40 pounds struck him on the sacral area of his back. He completed the remaining hour and 20 minutes of his trip although he was experiencing a stinging sensation and swelling in his back. He reported to work the next day, but after driving for several hours, he requested relief because of pain. That evening, he went to a neighborhood clinic where x-rays were taken. Thereafter the claimant attended the Central Medical Center in Baltimore, Maryland where he underwent physical therapy for five weeks was provided a back brace.

Finding that this brace was exacerbating his pain, Mr. Price next consulted Dr. John Tansey, an orthopedic surgeon, who prescribed medication to relieve the claimant's pain. On October 18, 1977, after being on sick leave for the previous five weeks, Mr. Price attempted to return to work. He completed his Washington, D.C. to Scranton, run but found that he had to stop and walk around every 30 or 45 minutes. The following day, after completing half of his return trip, he requested relief. Since that time, he has been unemployed.

The claimant testified that his back pain has not abated since the date of his accident. He can drive his own car but not for long distances; he is able to sleep comfortably only by lying on his side.

Medical Evidence

Extensive medical evidence both testimonial and documentary, bearing on the claimant's physical condition is summarized below.

Apart from the injury to his back, the claimant has a history of hypertension dating to 1964. The employer's personnel records show that the claimant took sick leave for this condition in 1964, 1967 and 1968. In 1972, he was temporarily disqualified from employment because of his high blood pressure and permitted to return only after the company doctor determined that his blood pressure was only temporarily elevated. (EX.-1 Report dated 1-4-72).

On March 4, 1976, the claimant was hospitalized for an atrial fibrillation. He was discharged ten days later markedly improved. (EX-2). On March 25, 1976, he was authorized to return to work after an examination by the company physician (EX-1).

Mr. Price was examined by three orthopedic surgeons after injuring his back in August 1977. He first sought treatment from Dr. Tansey on November 10. During this visit, the doctor noted that the claimant had some pain on palpitating the L5-S1 lumbarsacral area. From a review of x-rays supplied by the claimant, Dr. Tansey saw evidence of a calcified aorta causing him to request a cardiac evaluation before prescribing a program of exercise. (EX. 6, Dep. at 10).

The claimant saw Dr.Tansey again on December 6 and reported that he continued to suffer back pain and felt unable to drive long distances or lift. An x-ray taken at this time revealed a slight narrowing of the L5-S1 interspace, the same area to which the claimant ascribed his pain. Dr. Tansey regarded the claimant's August 11 accident as a "crowning blow" which was superimposed upon and thereby exposed this underlying defect. (EX.-6, Dep. 11-12).

Despite his inability to uncover significant objective findings which would substantiate the claimant's complaints, Dr. Tansey viewed his symptoms as genuine. He believed that the claimant had a significant amount of backache which would prevent him from driving for prolonged periods of time and which would be aggravated by the sedentary position required by the claimant's job. (EX.-6, Dep. at 21).

At the same time, Dr. Tansey regarded the claimant's cardiac condition as a potentially more serious problem. As he stated during his deposition, "He (the claimant) could probably survive his backache. He might suffer a lot in the long run, but it wasn't a direct hazard to himself or his passengers, where his cardiac problem was." (EX. 6, Dep. at 23).

Acting upon Dr. Tansey's suggestion that a cardiac evaluation was in order, the employer referred the claimant to Dr. Harold Draper, a specialist in cardiology, on December 20, 1977. He recorded the claimant's blood pressure as 164 and 182 over 100 and 100 which together with changes in the blood vessels of the claimant's eyes indicated uncontrolled chronic hypertension. He also found abnormal heart sounds and detected diffuse problems in blood vessels throughout the body. (TR. 102-105). An electrocardiogram also produced abnormal results which may have been caused by the medication the

claimant was taking. On the basis of these findings, coupled with his review of the claimant's prior medical history, Dr. Draper concluded that the claimant had hypertensive cardiovascular and peripheral vascular disease.

Because hypertensive changes can alter within a few days, Dr. Draper was unable to state with any certainty that this uncontrolled hypertension existed prior to the claimant's accident. He believed, however, that the other cardiovascular problems did constitute a permanent impairment which existed prior to August. (TR. 123). He stated that Mr. Price would have to be disqualified as a bus driver, not on the basis of the symptoms which fell short of meeting the New York Heart association's criteria for symptomatic heart disease, but rather because the stress of driving could pose a risk of provoking a ruptured blood vessel, another atrial fibrillation attack or congestive heart failure.

A second orthopedic surgeon, Dr. Jeffrey Goltz, examined the claimant on May 17, 1978, and confirmed Dr. Tansey's x-ray finding of degenerative disc disease L-5, S1. In addition, he found it significant that the claimant had a backward extension which was reduced by one third of that for a normal individual of claimant's age. (TR. 83) Dr. Goltz further reported that the claimant's pain extending from the lower back to the buttocks, was present when sitting for prolonged periods of time, on bending or walking on solid ground. He was unable to determine whether a trauma such as the one experienced by the claimant created or aggravated his disc condition, but he was more certain that such a trauma superimposed on a degenerative disc condition could produce the symptoms which the claimant described. (TR. 88). He diagnosed the claimant's condition as mild degenerative disc disease with chronic low back strain assessing the degree of impairment as 30 percent partial permanent disability (TR. 87, C 2). Because the claimant had reached maximum medical improvement, and was unable to sit, bend or drive for long distances, since to do so would impose maximum pressure on the claimant's back and thereby augment his pain, Dr.Goltz concluded that the claimant should not return to bus driving. Instead, he suggested that the claimant could handle a job which did not require prolonged sitting and which would permit him to stand for some 10 to 15 minutes each hour. (TR. 88).

At the employer's request, Mr. Price was seen by a third orthopedic surgeon Dr. Edward Wenzlaff, on March 6, 1978. Dr. Wenzlaff agreed with Dr. Tansey that there was x-ray evidence of a slight narrowing of the L5-S1 area, but no other objective findings of residual injury. (EX. 5, Dep. at 13). Apparently disbelieving the claimant's reports of pain, the doctor stated that if any discomfort was present shortly after the August 11 accident, it had disappeared by the time of his examination. (EX. 5, Dep. at 15).

Subsequent to Dr. Draper's evaluation, the employer sent Mr. Price to another cardiologist, Dr. Sidney Scherlis. His findings and conclusions are diametrically opposed to those of Dr. Draper. Thus, Dr. Scherlis found no evidence of cardiac enlargements nor any abnormal heart sounds. He did note tenderness on pressure to the right of the midline over the lower sacral area. He agreed that Mr. Price suffered from hypertension but found that it was labile and well-compensated with no cardiac embarrassment. He further wrote that the claimant made a good recovery from his isolated episode of atrial fibrillation and found no connection between this attack and his hypertension. [2]

Dr. Scherlis explained that atrial fibrillation frequently occurs in persons who do not have organic heart disease and may be precipitated by a variety of factors. It is not life threatening and can usually be treated effectively. In concluding, Dr. Scherlis found no evidence of cardiovascular disease which would prevent the claimant from resuming his activities as a bus driver. (CX-1)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

The parties stipulated and I find that: the accident occured on August 11, 1977 in Bloomsburg, Pennsylvania; there was an employee-employer relationship, the injury arose out of and in the course of employment; the employer is headquartered in Phoenix, Arizona and maintains a local office in Washington, D.C. where the

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[2] Dr. Draper also commented that only 7.5% of those persons with hypertension also experienced atrial fibrillation. (EX. 8)

claimant reported to work; the employee's residence at the time of the accident was in Maryland; his average weekly wage was $344.11 and he filed a timely notice of injury and claim. The claimant was temporarily totally disabled from August 14, 1977 to March 6, 1978 for which the employer voluntarily paid benefits of $250.67 for a total of $6,732.28; no further medical benefits are currently owed the claimant. With the exception of 1 and 1/2 days, the claimant has not returned to his regular employment since the date of his accident. The Notice of Controversion was filed August 29, 1978. (TR. 27-31).

I. Nature and Extent of Disability

The record in this case compels the conclusion that a work-related injury to the claimant's back has disabled him totally and permanently from performing his job as a long-distance bus driver.

The three orthopedists whose reports appear of record in this case concur that there is a narrowing of the space between discs in the claimant's back. Two of these specialists, Doctors Tansey and Goltz, believed that the claimant's pain is related to this condition. Although Dr. Goltz was uncertain whether the disc defect preceded or was caused by the claimant's accident, this fact is irrelevant, for even where the disability is produced by an aggravation of a pre-existing condition, the entire resulting disability is compensable under the Act. *Independent Stevedore Co.* v. *O'Leary*, 357 F.2d 812 (9th Cir. 1966). *Love* v. *W.M. Schlosser Co.*, BRB No. 77-202 (Feb. 27, 1978).

Moreover, both doctors also agreed that even in the absence of extensive objective data, the claimant's complaints of low back pain were genuine and that his condition would prevent his performing a job which required prolonged sitting, lifting or bending. It hardly needs comment that these are unavoidable functions which attend the performance of the only position which the claimant has held for the past 29 years.

Dr. Goltz's assessment that the claimant's back constitutes a 20 percent permanent partial disability does not detract from the conclusion that the claimant is permanently and totally disabled since "even a relatively minor injury may lead to a finding of total disability

if it prevents the employee from engaging in the only type of gainful employment for which he is qualified." *American Mutual Insurance Co. of Boston* v. *Jones*, 426 F.2d 1263, 1266 (D.C. Cir. 1970).

Doctors Tansey and Goltz conclusions conform to the claimant's own judgment that his back problems have incapacitated him from driving long distances (TR. 55-61). Since findings of disability may be based on lay evidence alone, *a fortiorari*, the claimant's testimony together with medical evidence of anatomic impairment is entitled to even greater weight in justifying a finding of total disability. See *Ballard* v. *Newport News Shipbuilding and Dry Dock Co.*, 8 BRBS 676, BRB No. 77-785 (Aug. 15, 1978); *Ruiz* v. *Universal Maritime Service Corp.*, 8 BRBS 457, BRB No. 78-135 (May 30, 1978).

I have no doubt that the claimant's testimony is credible. I was impressed by the discomfort he bore while remaining seated in the courtroom during the hearing of this matter. (TR. 89). Moreoever, throughout his 29 year career with the respondent, his personnel file reveals that his absences were for legitimate reasons associated with documented illness. His is not the work record of a malingerer or a hypochondriac. Further, comments appearing in several medical reports authenticate the claimant's testimony. Thus, Dr. Tansey commented that the claimant seemed distressed at the prospect of having to find other work; Dr. Scherlis remarked that the claimant suffered pain after only a half hour drive from his home to the physician's office; Dr. Draper recalled that the claimant chiefly focused on his back pain.

For these reasons, I am convinced that the claimant's back condition is genuine and that Dr. Wenzlaff's conclusion that the claimant suffered no permanent injury or disability to his back which would prevent his return to work, must be rejected.

I further find that the claimant's condition is permanent. When asked directly if the claimant had reached maximum medical improvement with respect to his back, Dr. Goltz answered, "Certainly his back problem. I don't think he's ever going back to work as a bus driver." (TR. 87). Moreover, "permanent disability as defined by the Act need not refer to a condition that is eternal or everlasting, but to a condition which is continual . . . and is . . . apparently of an

indefinite or lasting duration. Nor does the designation of any injury as permanent preclude the possibility of a change of condition." *Watson* v. *Gulf Stevedore Corporation*, 400 F.2d 649, 654-655 (5th Cir., 1968).

Since the claimant's symptoms, which prevent a return to his life-long occupation as a bus driver, continue unabated to the present time it is clear that he is permanently and totally disabled.

Although the claimant is unable to perform the job he held for 29 years, has had no other vocational skills and is 55 years old, he would not be incapacitated for other light work which accommodates his present limitations. However, the employer's burden is to show that alternate and suitable jobs are available which take into account the claimant's age, education and work experience. *American Stevedores* v. *Salzano*, 538 F.2d 933 (2nd Cir. 1976); *Smith* v. *Terminal Stevedores, Inc.*, BRB No. 78-584 (Dec. 31, 1979). Since the employer has not met this burden, the claimant must be considered totally disabled.

The Special Fund Is Not Liable

The employer submits that because the claimant's total disability is the product of both his pre-existing cardiovascular condition and his back problem, Section 8(f) of the Act applies to limit its liability for the payment of benefits to 104 weeks.

Section 8(f) states in pertinent part that in cases of "total permanent disability found not to be due solely to that injury or an employee having an existing permanent partial disability, the employer shall provide . . . compensation payments . . . for one hundred and four weeks only." In order for Section 8(f) to be applicable, the following prerequisites must be met: first, the employee must have a pre-existing permanent partial disability; second, that disability must be manifest to the employer, and third, the disability may not be due solely to the subsequent injury. *C. & P Telephone Co.* v. *Director*, 564 F.2d 503 (D.C. Cir. (1977)).

There is abundant medical evidence in this case which establishes that the claimant had several pre-existing permanent partial dis-

abilities; hypertension and a vascular condition. [3] I do not find that his single episode of atrial fibrillation constitutes a permanent pre-existing condition. The claimant made a good recovery from that episode; there is no evidence that it was related to his hypertension; or that there is a greater incidence of such attacks among persons having hypertension, or that there is a greater risk of a second attack in persons having had a prior experience.

The second requirement that a prior condition be manifest to the employer does not require actual knowledge so long as knowledge of the handicap is available to the employer at the time the employee was hired or retained. *Foley Co.* v. *Balderson*, 569 F.2d 133 (D.C. Cir. 1977); *Dillingham Corporation* v. *Massey*, 505 F.2d 1126 (9th Cir. 1974). Put another way, the information must be "objectively determinable" to the employer. *Director* v. *Universal Terminal and Stevedoring Corp.*, 575 F.2d 452 (3rd Cir. 1978).

Here, the employer did not have even imputed knowledge that the claimant was suffering from a diffuse cardiovascular disease since this condition was not diagnosed by Dr. Draper until 4 months after the claimant's accident occurred. Case law has enlarged the meaning of the word manifest to cover those situations where an employer did not possess, but could have obtained medical records. In those cases which imputed knowledge to an employer based on the mere availability of medical documentation, however; no uncertainty existed regarding the diagnosis of the employee's condition. *See, e.g. Director* v. *Universal Terminal & Stevedoring Corp., supra; Delinsky* v. *Brandt Airlex Corp.*, 9 BRBS 206 (Oct. 25, 1978). This is not the situation here since Doctors Scherlis and Draper disagree as to whether the claimant has a cardiovascular condition.

However, the employer did have actual knowledge of the claimant's hypertension. In fact, the employer acted upon its knowledge by referring the claimant to a physician for a special examination

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[3] The case law establishes that a pre-existing permanent partial disability need not be employment-related nor economically disabling. *See, C & P Telephone Co., supra; Padillo* v. *Marine Terminals Corp.*, 8 BRBS 152, BRB No. 77-318 (April 13, 1978).

before permitting him to return to work when an annual physical checkup revealed that his blood pressure exceeded acceptable limits. Thus, the claimant's hypertension was a pre-existing permanent partial disability manifest to the employer.

Nevertheless, a critical flaw remains in the employer's effort to bring this case within the protections of 8(f), for it has failed to prove that the claimant's back impairment was not the sole cause of his disability.

As discussed above, Doctors Tansey and Goltz agreed that the claimant could no longer function as a bus driver due to the back pain he suffered when seated for prolonged periods of time. Yet, at the same time that Dr. Tansey stated it would be "uncomfortable, not a very easy job," for Mr. Price to continue driving a bus, he also said that it would be possible for him to do so and that his cardiac condition posed a greater hazard than his back. What I understand Dr. Tansey to mean is that while it would not be physically impossible or a question of survival for the claimant to operate a bus with a back problem, however painful, a cardiac condition could pose lifethreatening risk to the claimant and his passengers. Benefits are not withheld from a claimant because his disability is not life-threatening, if it prevents him from performing his job. Even where a claimant may have a serious pre-existing permanent partial disability, he is entitled to compensation solely for a subsequent injury if it independently incapacitates him. *See Hunter* v. *Duncanson Harrelson Co.*, 8 BRBS 83, BRB No. 77-433 (March 30, 1978).

Further, as a cardiologist, Dr. Draper properly withheld his opinion as to the extent to which the claimant's back problems affected his disability. Therefore, his judgment that the claimant had a cardiovascular disease which existed prior to the August accident, in no way conflicts with a finding that the claimant was totally disabled by the injury to his back. Were it not for his accident, Mr. Price might still be driving a Greyhound bus. Accordingly, I find that the employer is liable for the entire amount of this claim without contribution from the Special Fund.

The Doctrine of Collateral Estoppel is Inapplicable

The claimant urged that the employer was estopped from contesting the issue of total disability due solely to a back injury since that issue was allegedly resolved favorably for the claimant by a disability board operating under the terms of the company-union contract.

The doctrine of collateral estoppel precludes a party to an action from relitigating in a subsequent proceeding issues which were litigated and resolved between the same parties in a prior proceeding by a court of competent jurisdiction. *Davis, Administrative Law Treatise*. Vol II, Sec. 18.01-.12 (1958). By no stretch of the imagination can that doctrine be applied to this case.

The claimant gave the barest statement of the issues which were ostensibly before the disability board. This falls far short of demonstrating an identity of issues between the first proceeding and those before this forum. No record of the previous proceeding, or any reasoned decision was introduced into evidence.[4] Further, the claimant failed to show what the requisite degree of proof may have been or whether the standards governing the proceeding were substantially similar to those required for administrative hearings under the Act. It is clear that the employer did not litigate the 8(f) issue, and indeed, may not have had any opportunity to do.

I am even more skeptical that a union-management disability board is a court of competent jurisdiction.[5] However, since the claimant supplied no information as to the composition or procedures of that body, I need not speculate on its competency.

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[4] Claimant offered into evidence as CX 6, a document which awarded a sum of money to the claimant as disability benefits, but it is a form, not a reasoned decision. I admit the document into evidence but accord it no weight.

[5] The claimant stated in its brief that the question of claimant's disability was presented to a medical arbitration board. However CX 6 is excerpted from a manual titled Greyhound Retirement and Disability Trust which indicates that such matters are presented to a committee of the Board of Trustees. See CX 7 at 21, 29.

Employer is Liable Under Section 14(e)

Section 14(e) imposes a ten percent penalty on compensation owed to the claimant if the employer fails to file a notice of controversion within 14 days after the employer had knowledge of the alleged injury.

In the instant case, the employer had timely notice of the claimant's injury on or about August 12, 1977, but did not file a Notice of Controversion until August 29, 1978. Since the employer has offered no explanation for its failure to file timely, the mandatory 10 percent penalty must be imposed on all compensation payments owed until August 29, 1978, *Director* v. *Cooper Associates Inc.*, ____ F.2d. ____ (D.C. Cir. September 28, 1979).

Attorney's Fees

On December 27, 1979, counsel for the claimant submitted a request for attorney's fees. The employer responded with numerous and detailed objections by letter dated January 4, 1980. For the following reasons, counsel is instructed to submit an amended request.

1. Counsel requested fees for services which apparently were performed before the Deputy Commissioner, Pursuant to 20 C.F.R. 702.132, I am precluded from approving fees for work which was not performed in preparing and presenting the case in the administrative forum. Therefore, in submitting an amended application, counsel should include only those services undertaken while the case was pending in the Office of Administrative Law Judges.

2. Counsel listed a total number of hours to encompass a series of telephone calls, numerous pieces of correspondence and various dates covering interviews with the client. The Benefits Review Board held that an application fee prepared in a manner virtually identical to that employed by counsel, was unacceptable for the "categories are too all encompassing, thus preventing an accurate determination of the work described." *McCloud* v. *George Hyman Construction Co.*, BRB No. 78-606 (July 31, 1979). Accordingly, counsel's amended

application should itemize the amount of time expended for each service performed.

3. Counsel billed his services at $100.00 per hour. Recently, the Benefits Review Board cited $79.00, as the average hourly billing rate for attorneys in the northeast with ten years of experience. *Schneider* v. *Director*, BRB No. 79-383 BLA (Dec. 12, 1979). The employer indicates that claimant's counsel has been practising for approximately 5 years. Since the issues in this case were not of great complexity, claimant's counsel is requested to explain in his amended application the factors which might justify a billing rate over $75 per hour.

Other matters raised by the employer shall be addressed after an amended application is received. The employer shall have 10 days from the date on which the amended application is served to submit any additional comments.

ORDER

1. Respondents shall pay compensation to the claimant for permanent total disability based on an average weekly wage of $344.11 commencing March 7, 1978 to the present and continuing for the duration of his disability. Such compensation is subject to adjustments pursuant to Section 10(h) of the Act.

2. Respondents shall pay the claimant for such medical expenses as may arise in connection with the injury sustained on August 11, 1977 in accordance with Section 7(a) of the Act.

3. Respondents shall pay interest at the rate of six percent per year on all accrued compensation from the date such payments were due until the date of payment.

4. Respondents shall pay the claimant, an additional amount equal to 10 percent of all unpaid installments ordered to be paid by them in paragraph 1 of this Order, from March 7, 1978 to the date the

Notice of Controversion was filed, as provided by Section 14(d) and (e) of the Act.

/s/ ARLINE PACHT

Arline Pact
Administrative Law Judge

Dated: March 17, 1980
Washington, D.C.